Hum Peng Sin v Lim Lai Hoon & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO P–04–9 OF 1996
GOPAL SRI RAM, SITI NORMA YAAKOB AND DENIS ONG JJCA
12 JULY 2001

Civil Law Act *— Damages — Fatal accident — Dependency claim — Realistic mutiplicand applied — Civil Law Act 1956 s 7(3) —* **Civil Law Act**

Damages *— Fatal accident — Loss of wife's services — Costs of hiring maid, whether recoverable — Multiplier and multiplicand applied — Civil Law Act 1956 s 7(3)*

The deceased died at age 40 as a result of a motor accident, leaving behind her husband ('the plaintiff') and two young children. The plaintiff brought an action against the defendant for negligently causing the deceased's death, and claimed, inter alia, RM400 per month as the cost of engaging a housekeeper to look after the children on the ground that the cost of living had increased. The sessions court, however, refused to make an award for the loss of the wife's services and awarded the plaintiff only RM240 per month as the loss of dependency despite it having been proved that the deceased gave her husband RM450 per month. Both these awards were upheld by the learned intermediate appellate judge. Before the Court of Appeal, the findings on both awards were attacked. The issues raised were whether the plaintiff could recover for the loss of the deceased's services, and the quantum of damages that were to be awarded under both heads of claim if the first issue was resolved in the plaintiff's favour.

Held, partially allowing the appeal:

(1) At common law, a husband could recover damages, inter alia, for the loss of the services provided by his wife. But an amendment to s 7 of the Civil Law Act 1956 ('the Act') changed all that (see p 235E). What proviso (iii) to s 7(3) of the Act prohibits is an award for the loss of consortium or services where that is the sole head of claim. The third proviso does not prohibit an award for the loss of the services provided by a wife when such a claim is coupled with another head of claim for either actually engaging a housekeeper, as was the case in *Neo Kim Soon (Administrator of the estate of Phanna Mannechuang, deceased) v Subramaniam a/l Ramanaidu*[1995] 3 MLJ 435. Neither did it apply here where it was proved that such a housekeeper had to be engaged but was not because the plaintiff husband could not afford it due to his impecuniosity (see p 236C–D).

(2) For the cost of hiring a maid to replace the services rendered by the deceased, a multiplier of ten was just. The court derived this by subtracting 40 (the age of the deceased at the date of her death)

from 55 (the age at which she would have retired), multiplying the difference by two and dividing the product by three. In other words, 55 – 40 x $^2/_3$ = 10. Now, for the multiplicand, the court considers a sum of RM200 per month to be adequate. The total sum amounted exactly to RM24,000 that is 200 x 10 x 12 = 24,000. The court would round this off at RM23,000 taking into account the various vicissitudes (see p 237B–C).

(3) As for the award for the loss of dependency, the court considers the multiplicand selected by the sessions court to be unrealistic having regard to the evidence on record. The sum of RM400 per month was reasonable in all the circumstances of the case. The multiplier was as prescribed by the fourth proviso to s 7(3) of the Act (see p 237C–D).

[**Bahasa Malaysia summary**

Si mati telah meninggal dunia pada umur 40 tahun akibat satu kemalangan motor, meninggalkan suami beliau ('plaintif') dan dua orang anak yang masih kecil. Plaintif telah memulakan satu tindakan terhadap defendan kerana dengan cuai telah menyebabkan kematian si mati, dan menuntut, antara lain, RM400 sebulan untuk kos mengupah seorang pembantu rumah untuk menjaga anak-anak atas alasan bahawa kos sara hidup telah meningkat. Mahkamah sesyen, bagaimanapun, enggan untuk membuat award untuk kehilangan perkhidmatan isteri dan mengawardkan plaintif hanya RM240 sebulan untuk kehilangan tanggungan walaupun telah dibuktikan bahawa si mati telah memberikan suami beliau RM450 sebulan. Kedua-dua award tersebut telah dikekalkan oleh hakim rayuan pengantara yang arif. Di hadapan Mahkamah Rayuan, penemuan-penemuan ke atas kedua-dua award tersebut telah dibidas. Persoalan-persoalan yang ditimbulkan adalah sama ada plaintif boleh mendapat ganti rugi untuk kehilangan perkhidmatan si mati, dan kuantum ganti rugi yang akan diawardkan di bawah kedua-dua tajuk tuntutan jika persoalan pertama telah diselesaikan yang menyebelahi plaintif.

Diputuskan, membenarkan rayuan tersebut:

(1) Dalam common law, seorang suami boleh menuntut ganti rugi, antara lain, untuk kehilangan perkhidmatan yang telah diberikan oleh isteri beliau. Tetapi satu pindaan kepada s 7 Akta Undang-Undang Sivil 1956 ('Akta tersebut') telah menukar semua itu (lihat ms 235E). Apa proviso (iii) kepada s 7(3) Akta tersebut melarang adalah satu award untuk kehilangan konsortium atau perkhidmatan di mana ia adalah satu-satunya tajuk tuntutan. Proviso ketiga tersebut tidak melarang satu award untuk kehilangan perkhidmatan yang diberikan oleh isteri apabila tuntutan demikian disertakan dengan satu tajuk tuntutan lain untuk sama ada mengupah seorang pembantu rumah, seperti

dalam kes *Neo Kim Soon (Administrator of the estate of Phanna Mannechuang, deceased) v Subramaniam a/l Ramanaidu* [1995] 3 MLJ 435. Maupun ia terpakai di sini di mana ia telah dibuktikan bahawa seorang pembantu rumah perlu diupah tetapi tidak dibuat begitu kerana suami plaintif tidak mampu kerana kemiskinan beliau (lihat ms 236C–D).

(2) Berhubung kos mengupah seorang pembantu rumah untuk menggantikan perkhidmatan si mati, satu pendarab sepuluh adalah adil. Mahkamah mendapat ini dengan menolak 40 (umur si mati pada tarikh beliau meninggal dunia) daripada 55 (umur beliau sepatutnya bersara), mendarab perbezaannya dengan dua dan membahagikan hasilnya dengan tiga. Dalam erti kata lain, 55 – 40 x $^{2}/_{3}$ = 10. Sekarang, untuk angka yang didarab, mahkamah menganggap jumlah RM200 sebulan adalah mencukupi. Jumlah keseluruhan yang betul adalah RM24,000 iaitu 200 x 10 x 12 = 24,000. Mahkamah akan memberikan angka penuh RM23,000 dengan mengambilkira pelbagai jatuh bangun (lihat ms 237B–C).

(3) Berhubung award untuk kehilangan tanggungan, mahkamah mengambilkira angka yang didarab yang dipilih oleh mahkamah sesyen sebagai tidak realistik apabila diambilkira keterangan pada rekod. Jumlah RM400 sebulan adalah munasabah dalam semua keadaan dalam kes ini. Pendarab tersebut ada dinyatakan dalam proviso keempat kepada s 7(3) Akta tersebut (lihat ms 237C–D).]

Notes

For cases on damages arising from a fatal accident, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 2655–2688.

Cases referred to

Alcoa Minerals of Jamaica Inc v Broderick [2000] 3 WLR 23 (refd)
Liesbosch Dredger v SS Edison [1933] AC 449 (refd)
Neo Kim Soon (Administrator of the estate of Phanna Mannechuang, deceased) v Subramaniam a/l Ramanaidu [1995] 3 MLJ 435 (folld)

Legislation referred to

Civil Law Act 1956 s 7(3), proviso (iii)

Baldev Singh Bhar (*DP Rajah*) (*DP Rajah & Co*) for the appellant.
VK Desaratharaj (*VP Nathan & Partners*) for the respondents.

Gopal Sri Ram JCA. (delivering judgment of the court): This case raises an issue of some importance. It has to do with the admission of a head of damages for personal injuries that constantly comes before the subordinate courts. It all turns on the construction of the third proviso to s 7(3) of the Civil Law Act 1956 ('the Act'). The factual matrix against which the question at issue has arisen is not in dispute.

On 16 October 1989, the deceased died as a result of a motor accident. She was 40 years old at the date of the accident. She left behind her husband, the plaintiff, and her two children aged ten and 13. The deceased worked in a factory and earned RM600 per month. She also provided valuable services at home. She cooked, washed clothes and kept house.

The husband brought an action against the defendant for negligently causing the deceased's death. Evidence was led at the trial to prove that a housekeeper had been engaged for a period of two years at a sum of RM280 per month. The husband however claimed RM400 per month as the cost of engaging a housekeeper to look after the children on the ground that the cost of living had increased. He alleged that this was the sum demanded by maids at the material time and that he was not in a financial position to pay this sum. The sessions court however refused to make an award for the loss of the wife's services. Additionally, the sessions court awarded only RM240 per month as the loss of dependency despite it having been proved that the deceased gave her husband RM450 per month and that her only real expense was a sum of RM90 per month that she paid by way of installments for a motor cycle. Both these awards were upheld by the learned intermediate appellate judge.

Before us, the findings on both awards were attacked. Two issues were raised. The first was whether the plaintiff could recover for the loss of the deceased's services. The second has to do with the quantum of damages that are to be awarded under both heads of claim if the first issue is resolved in the plaintiff's favour.

Let me take the first issue. Now at common law, a husband could recover damages, inter alia, for the loss of the services provided by his wife. But an amendment to s 7 of the Act changed all that. This is what the material portion of the section says:

> The damages which the party who shall be liable under sub-s (1) to pay to the party for whom and for whose benefit the action is brought shall, subject to this section, be such as will compensate the party for whom and for whose benefit the action is brought for any loss of support suffered together with any reasonable expenses incurred as a result of the wrongful act, neglect or default of the party liable under sub-s (1):
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> Provided that —
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> (iii) no damages shall be awarded to a parent on the ground only of his having been deprived of the services of a child; and no damages shall be awarded to a husband on the ground only of his having been deprived of the services or society of his wife;

The section and its third proviso were considered by this court in *Neo Kim Soon (Administrator of the estate of Phanna Mannechuang, deceased) v Subramaniam a/l Ramanaidu* [1995] 3 MLJ 435, in almost similar circumstances. That was a case in which the wife was killed in an accident. After her death, her husband engaged a servant to look after the child of the marriage. When she was alive the wife had looked after the child. The sessions court allowed the husband's claim for the servant's wages. The High Court reversed. On further appeal, this court restored the judgment

of the sessions court. Mahadev Shankar J who delivered the judgment of this court said:

> We agree with Mr Chok Chin You of counsel for the plaintiff/appellant that what has been done away with by the proviso (iii) is an award of damages, in this case to the deceased's husband, *only* on the ground that he has been deprived of the services or society of his wife. So far as a surviving husband is concerned, the proviso has abolished any award by way of general damages for loss of consortium. In other words, proof of the death of a wife, without more, will not entitle the surviving husband to an award in damages.
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> It is a different matter altogether where a husband has not only lost his wife, but has also been put to monetary loss which has been the direct result of the negligence. Such loss in our view continues to be recoverable.

I am entirely in agreement with this view. In my judgment, what proviso (iii) to s 7(3) of the Act prohibits is an award for the loss of consortium or services where that is the sole head of claim. In my judgment the third proviso does not prohibit an award for the loss of the services provided by a wife when such a claim is coupled with another head of claim for either actually engaging a housekeeper, as was the case in *Neo Kim Soon*. Neither does it apply here where it is proved that such a housekeeper has to be engaged but was not because the plaintiff husband could not afford it due to his impecuniosity. The decision of the Privy Council in *Alcoa Minerals of Jamaica Inc v Broderick* [2000] 3 WLR 23 makes it amply clear that the rule in *Liesbosch Dredger v SS Edison* [1933] AC 449 that the impecuniosity of a plaintiff may break the chain of causation is not an inflexible one. To quote Lord Slynn of Hadley who delivered the decision of the board in *Alcoa* at p 30:

> The decision in *The Liesbosch* has thus obviously been much discussed but it is not necessary for their Lordships in the present case to consider whether as a part of the law of Jamaica what is said by Lord Wright should be rejected as in the alternative they were invited to do. It seems generally to be accepted that there is no absolute rule that where the plaintiff at the date of breach did not have the funds to repair the damage that his impecuniosity is to be ignored in all cases when deciding the appropriate date for the assessment of damages.

And in a later passage his Lordship states what I think is the true principle:

> It seems to their Lordships that this case is clearly to be distinguished from the position in *The Liesbosch* where the cost of hiring was categorized as a separate head of damage from the cost of replacing the dredger, the cost of hiring being due to a separate cause namely the plaintiff's impecuniosity. In the present case there is only one head of damage namely the cost of repairing the building. The increase in that cost was due to rapid inflation and the fall in the value of the Jamaican dollar. There are not here two heads of damage, one of which must be separated from the other and attributed to the plaintiff's lack of funds. The need to repair the roof was a direct consequence of the tort and the real question is whether Mr. Broderick was in breach of his duty to mitigate his damage.

To emphasize, it is clear that the word 'only' in the third proviso does not extend it to a claim by a husband for damages for the loss of his wife's services where a replacement for those services is actually secured at a cost

as in *Neo Kim Soon* or where there is a claim for potential loss as in the present instance. It follows from what I have said thus far that an award under this head ought to have made in the plaintiff's favour.

The next issue has to do with the assessment of quantum. This is a fairly straightforward question. For the cost of hiring a maid to replace the services rendered by the deceased, I think that a multiplier of ten is just. I derive this by subtracting 40 (the age of the deceased at the date of her death) from 55 (the age at which she would have retired), multiplying the difference by two and dividing the product by three. In other words, $55 - 40 \times {}^{2}/_{3} = 10$. Now, for the multiplicand, I consider a sum of RM200 per month to be adequate. The total sum amounts exactly to RM24,000 that is 200 x 10 x 12 = 24,000. I would round this off at RM23,000 taking into account the various vicissitudes.

As for the award for the loss of dependency, I consider the multiplicand selected by the sessions court to be unrealistic having regard to the evidence on record. I think that a sum of RM400 per month is reasonable in all the circumstances of the case. The multiplier is as prescribed by the fourth proviso to s 7(3) of the Act.

The award of the sessions court refusing an award for loss of services is accordingly set aside. I would award RM23,000 under that head of damages. As for the multiplicand applied by the sessions court, I would set it aside and substitute in its place a multiplicand of RM400. The multiplier is as specified by the Act.

One word about the product. It is to be remembered that all products on the statutory formula prescribed by the Act are upon a direct multiplication and not by reference to actuarial tables.

The upshot is that the appeal is allowed to the extent hereinbefore indicated. The orders of the sessions court and the High Court are set aside and substituted with the orders herein made. All other consequential relief granted by the sessions court stands. The plaintiff will have his costs at all levels. The deposit paid into court will be paid out to the plaintiff.

Appeal allowed.

Reported by Wong Ee Lynn